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No. 99-689

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

TERRY STEWART, ET AL.,
PETITIONERS,

-vs-

JAMES GRANVIL WALLACE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit err in holding, contrary to *Strickland* and decisions by other circuit courts of appeal, that defense counsel had a duty in a capital sentencing proceeding to investigate and provide facts to the examining mental health experts that those experts do not request?

2. Did the Ninth Circuit err in holding, contrary to *Tamayo-Reyes* and decisions by other circuit courts of appeal, that a state court's refusal to hold an evidentiary hearing in collateral proceedings was itself "cause" justifying an evidentiary hearing and the presentation of new evidence before the district court?

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REASONS WHY THE WRIT SHOULD ISSUE

Wallace's brief fails to address the important issue in this case. The State of Arizona does not dispute that it is well established that counsel has a Sixth Amendment duty, in capital cases, to conduct a reasonable investigation into a defendant's background in search of possible mitigating evidence. The issue presented in this case concerns how that duty of counsel interrelates with the investigative duties of mental health experts hired to render opinions regarding a defendant's mental health at the penalty phase. Where does counsel's duty to investigate and develop information end and the expert's duty begin? Courts have acknowledged that the exact parameters of counsel's duty to investigate and present mitigating factors are difficult to ascertain. *Eddmonds v. Peters*, 93 F.3d 1307, 1323-24 (7th Cir. 1996) (citing *Stewart v. Gramley*, 74 F.3d 132, 135 (7th Cir. 1996)). The Ninth Circuit held in this case that counsel's duty to investigate extends beyond even what the expert requests. The Eleventh and Fourth Circuits have rejected that proposition and held that an attorney may rely on the expert to further that investigation. *See Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990) and *Smith v. Dixon*, 766 F.Supp. 1370 (E.D.N.C. 1991) *aff'd* 996 F.2d 667, 679 (4th Cir. 1993), *rev'd, en banc, on other grounds*, *Dixon v. Smith*, 14 F.3d 956 (4th Cir. 1994). Confusion regarding this extremely important issue, as demonstrated in this case, necessitates that certiorari be granted.

Wallace also alleges that the only matter at issue in Petitioner's petition for writ of certiorari concerns the Ninth Circuit's ruling granting Wallace an evidentiary hearing, and that this does not warrant certiorari review. This allegation is incorrect. The Ninth Circuit's opinion in this case went much further than simply ordering an evidentiary hearing; it announced a ruling of law that determined the standard to be applied in all capital cases in the circuit. In this case the court specifically held that attorneys have a duty, in capital sentencing proceedings, to investigate and provide facts to mental health experts examining their client that the experts do not even request. This holding clearly warrants certiorari review, as it is contrary to the holdings of other circuits and materially conflicts with *Strickland v. Washington*, 466 U.S. 668 (1984).

I

THERE EXISTS A CONFLICT AMONG THE CIRCUIT COURTS REGARDING WHETHER COUNSEL HAS A DUTY, UNDER THE SIXTH AMENDMENT, IN CAPITAL SENTENCING PROCEEDINGS, TO INVESTIGATE AND PROVIDE INFORMATION TO THEIR MENTAL HEALTH EXPERTS THAT THE EXPERTS DO NOT REQUEST.

Wallace claims that the Ninth Circuit's ruling requiring counsel, in capital sentencing proceedings, to investigate and provide facts to their mental health experts, that the experts do not request, does not conflict with the rulings of other circuit courts. Wallace attempts to distinguish *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990) and *Smith v. Dixon*, 766 F.Supp. 1370 (E.D.N.C. 1991), *aff'd* 996 F.2d 667, 679 (4th Cir. 1993), *rev'd, en banc, on other grounds*, *Dixon v. Smith*, 14 F.3d 956 (4th Cir. 1994) without success.

Wallace alleges that *Card* is distinguishable because there mental health experts and counsel had conducted substantial investigation into the defendant's background, rendering counsel's failure to continue to investigate and uncover certain facts reasonable. This distinction fails. Like the defendant in *Card*, by the time of sentencing, Wallace's mental health had been examined by numerous professionals; one determined his competency to plead guilty, and the other three rendered opinions regarding his mental health at the time of the offenses. Wallace was also interviewed at length by the probation department as demonstrated by the degree of detail regarding his background that was included in his presentence report. None of the experts hired by Wallace's counsel (Couser) informed him that they were unable to render an accurate diagnosis with the information they had obtained through their interviews and testing, or which was otherwise available to them. None of them requested Couser to investigate further. All of them fully evaluated Wallace's mental health by interviewing and testing him, and they inquired into his background.

In preparation for sentencing, Dr. Bendheim evaluated Wallace at length, reviewed his background and his family history, and even interviewed him after placing him under the influence of sodium amytol. Despite his efforts, Dr. Bendheim was unable to uncover any evidence of classic insanity, and found no evidence of epilepsy or brain injury. Dr.

Bendheim concluded that Wallace had not been in a typical dissociative state during the murders, and he found no evidence of mental illness. Dr. Bendheim did not indicate that more testing or information was needed in order to render an accurate opinion.

Wallace's mental health was also examined before sentencing by two other psychiatrists hired by the court, Dr. James Little and Dr. Barry Morenz. Those doctors conducted an intense battery of tests and evaluated Wallace's family history, difficult upbringing, career in the military, prior marriage, and the results of prior testing that had been conducted in 1984, including the MMPI evaluation. Drs. Little and Morenz concluded that Wallace possessed an anti-social personality disorder, displayed a history of polysubstance abuse, and was very likely to reoffend. The doctors' joint report was submitted to the trial court at sentencing as an attachment to Wallace's presentence report. Neither of those doctors indicated that more testing or information was necessary in order to accurately evaluate Wallace's mental health.

Like the defendant in *Card*, there was nothing that was uncovered in any of these evaluations that should have alerted Couser to the fact that more information or investigation regarding Wallace's background was needed in order to obtain an accurate expert opinion of Wallace's mental health. The mental health experts did not request more information and they were able and willing to render their diagnoses with the information they had. Thus, *Card's* holding that counsel acts reasonably in failing to continue investigating a capital defendant's mental health at the penalty phase when multiple mental health experts, who are fully capable of obtaining information on their own, have rendered opinions without indicating any need for further information, applies to this case. The Ninth Circuit's opinion therefore conflicts with the opinion of the Eleventh Circuit and certiorari review is appropriate.

Smith is also directly applicable to this case and demonstrates a conflict between the Ninth and Fourth Circuits. There, the defendant claimed, like Wallace, that his counsel rendered ineffective assistance at the sentencing phase of a capital case by failing, among other things, to "consult with and fully inform the psychiatrists" who evaluated the defendant, and to request and review his mental health records. The district court made it clear that it was not the attorney's job to provide psychiatric experts with the information they needed to conduct their evaluations. *Smith*, 766 F.Supp.

at 1390. The court further noted that the fact that the doctor had obtained the necessary information himself in preparing his evaluation demonstrated that this was his task, and not the defendant's attorney's. *Id.* at 1391. This holding was affirmed by the Fourth Circuit. *Smith v. Dixon*, 996 F.2d at 679. Wallace's claim that *Smith* fails to demonstrate a conflict is erroneous. Contrary to Wallace's claim, the *Smith* court's failure to rule that counsel had rendered ineffective assistance of counsel did not alter the fact that the district court held, in that case, that defendant's attorney did not have a duty to provide unrequested information to his mental health experts.

II

THE NINTH CIRCUIT'S HOLDING IMPOSING A DUTY ON COUNSEL, IN CAPITAL SENTENCING PROCEEDINGS, TO INVESTIGATE AND PROVIDE UNREQUESTED INFORMATION TO THEIR EXPERTS MATERIALLY CONFLICTS WITH *STRICKLAND*.

A. DISTINCTION BETWEEN COUNSEL'S DUTIES AT THE GUILT AND PENALTY PHASES VIOLATES *STRICKLAND*.

Wallace attempts to justify the Ninth Circuit's imposition of a greater duty upon defense counsel, in capital proceedings, to provide information to their mental health experts at the penalty phase than at the guilt phase by contending that the scope and range of relevant evidence at sentencing in a capital cases is broader that at the guilt phase. The Ninth Circuit indeed held, in *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995), *Caro v. Calderon*, 165 F.3d 1223 (9th Cir.), *cert. denied*, 119 S.Ct. 2414 (1999), that this broadened pool of relevant evidence warranted the imposition of a greater duty upon counsel to investigate. This position is contrary to *Strickland*, wherein this Court rejected the suggestion that counsel's performance in capital sentencing proceedings should be judged under more rigorous standards than those applicable to the guilt phase. 466 U.S. at 686–87. Just because there is more evidence that might be relevant in the penalty phase of capital proceedings than at the guilt phase should not mean that defense counsel has any greater duty to investigate and provide that information to his experts. This Court has stated that counsel's duty to make "reasonable investigations" applies to both the guilt and penalty phases of capital proceedings; the Ninth Circuit's decision imposing a greater duty on counsel at the penalty phase that at the guilt phase materially

alters the standards for performance of counsel set forth by this Court and warrants certiorari review.

B. NINTH CIRCUIT'S RULING VIOLATES "CONTEMPORARY ASSESSMENT" RULE AND DECISIONS FROM OTHER CIRCUITS.

Wallace's characterization of the Ninth Circuit's holding as merely an application of the "reasonable investigation" requirement of *Strickland* is erroneous. Contrary to Wallace's assertions, the court of appeals based its holding that Couser had breached his "duty" to provide unrequested information to the mental health experts upon information obtained from post-sentencing examinations, rather than upon what was available to him at the time. Even assuming, arguendo, that Couser had a duty to provide such information to his experts, whether his failure to do so constitutes ineffective assistance of counsel can only be fairly evaluated based upon information readily available to him at that time, and not information gleaned years after the fact, and provided by new mental health experts after additional testing. The Ninth Circuit's ruling which permits counsel's performance to be evaluated based upon such information violates this Court's "contemporary assessment" rule articulated in *Strickland*, as well as the opinions of other circuit courts, as detailed in the Petition for Certiorari at pp. 12-15.

III

THE NINTH CIRCUIT'S DECISION TO HOLD A HEARING IN FEDERAL COURT AND TO ADMIT EVIDENCE NEVER PRESENTED IN STATE COURT OFFENDS PRINCIPLES OF COMITY AND MATERIALLY MISCONSTRUES *TAMAYO-REYES*.

Applying *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), the Ninth Circuit found that the state court's failure to hold a hearing on Wallace's second petition for post conviction relief constituted "cause" justifying admission of new evidence in federal court. The Ninth Circuit held that Wallace had presented a colorable claim of ineffective assistance of counsel in state court, and that the state court's refusal to grant him discovery and a hearing constituted "cause" warranting a hearing and the presentation of new evidence in state court. The Ninth Circuit's holding is materially flawed in that the state court held that Wallace had *not* presented a colorable

claim for relief on his ineffective assistance of counsel claim, which is evident from the fact that it did not grant him a hearing on the claim. Whether Wallace's ineffective assistance of counsel claim was colorable or not was an issue of state law, for which federal review was unavailable. The Ninth Circuit's recharacterization of the claim as colorable was error, as it was not an issue reviewable in federal habeas corpus proceedings; the Ninth Circuit's use of that ruling to then establish "cause" justifying an evidentiary hearing materially altered this Court's holding in *Tamayo-Reyes*, and justifies certiorari review.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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